Supreme Court, U.S.
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No. 99-1726

IN THE
Supreme Court of the United States

SANDRA KAY BATTISTA, *et al.*,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, appointed receiver of Bank of Newport, a failed depository institution,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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The FDIC argues in its opposition to the petition that subsections (d) and (e) of 12 U.S.C. § 1821 must be read as if they were one, and that Congress wanted all pre-seizure claims against a failed bank and all post-seizure claims against the FDIC to be treated alike. Consequently, the FDIC argues, both kinds of claimant must be paid from the liquidated assets of the failed bank and petitioners do not have the right to be paid in cash, despite California law requiring the payment of wages in cash. The FDIC's argument does not stand scrutiny.

If the FDIC and the Ninth Circuit are correct that Congress intended that all parties with claims arising out of a bank's failure be satisfied pursuant to § 1821(d), then why did Congress, as the FDIC admits, fail to include parties with claims under § 1821(e) in the list of those who are to share in the liquidated assets that are all that is available to subsection (d) claimants? The consequence of this reasoning is that if "damages" claimants like petitioners cannot have cash from the FDIC then Congress must have intended that they get nothing at all.

Fortunately, this argument is contradicted by the words of the statute and by Congress' obvious purpose in enacting two separate subsections using entirely different words, as well as the public policy behind subsection (e) *and* the understanding of every court that has looked at any part of this issue.

The FDIC's position and the decision below thus set up a genuine conflict with numerous Courts of Appeals cases and with decisions of this Court that requires the grant of certiorari to correct.

FURTHER REASONS FOR GRANTING THE WRIT

A. The Sweeping Implications of the Ninth Circuit's Merger of Subsection (e) Into Subsection (d) Require This Court's Intervention.

The FDIC's casual dismissal of the necessity for certiorari in this case is wrong on two counts. While no other decision holds *directly* contrary to the Ninth Circuit's decision below, that decision is entirely inconsistent with the understanding

shown in numerous other Court of Appeals cases. There is certainly no bright line rule that unless two circuits hold directly contrary certiorari is not necessary or appropriate.

Even more important, however, is the long-range implication of the Ninth Circuit's decision here. 12 U.S.C. § 1821(e) grants a right to damages to more than merely persons with repudiated severance and separation agreements such as petitioners. Subsections (4), (5) and (6) of § 1821(e) separately provide for the payment of damages after repudiation in other cases and the Ninth Circuit's incorrect holding is equally applicable to those claimants as well.

Subsections (e)(4) and (e)(5) apply to leases where the failed bank was a lessee or lessor. In each case, the FDIC is made liable for "damages" if at any time it disaffirms or repudiates a lease. Similarly, subsection (e)(6) allows the FDIC to repudiate real property sales contracts. There too, Congress provided "damages" for the injured buyer.

In those cases, however, unlike the requirement in subsection (e)(3) that the FDIC must act within a "reasonable" time, the FDIC may repudiate at any time, even long after all of the former bank's assets have been liquidated and distributed. Under the Ninth Circuit's holding below, if the former bank has been liquidated and the proceeds distributed within the statutory timetable Congress mandated in subsection (d), all that the lessor, lessee or buyer would receive is a receiver's certificate, solely payable from a fund that no longer exists, that is therefore actually worthless when tendered.

Parties to long-term vested financial obligations of the failed bank were given a special status by Congress in subsection (e). The effect of the Ninth Circuit's holding is that, unlike ordinary trade creditors who at least have an opportunity within a short and defined period of time to prove their claims and to get in line for whatever is left of the assets of the failed bank, these "damages" claimants would be pretty much guaranteed to get nothing at all, turning Congress' intent upside down. This

interpretation is a sweeping revision of the law with far-reaching implications.

Aside from the clearly deleterious impact this would have on all present parties with contracts with banks already seized, the likelihood of such a disastrous consequence could have a serious future impact on the willingness of any third party to enter into a contract with any financial institution, because under the Ninth Circuit's holding if the bank should fail this valuable asset would be replaced with a piece of paper with no value at all.

It does not require a direct conflict with the decisions of other Circuits to make the long- and short-term consequences of the Ninth Circuit's interpretation of § 1821(e) a fit subject for certiorari. However, it is also true that this decision is inconsistent with all inferences generally drawn by other Courts of Appeals and this Court.

Repudiation has invariably been treated by other courts as a breach of contract that gives rise to an ordinary contract claim for compensatory damages. *See, e.g., Howell v. FDIC*, 986 F.2d 569, 579 (1st Cir. 1993), and *see Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, __ U.S. __ (No. 99-244), slip opinion at 5-6 (June 26, 2000). The purpose of such damages has always been understood to be to put the injured party in as good a position as that party would have been put by full performance of the contract. *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 2117 (9th Cir. 1983). In other words, damages are supposed to make one whole by precisely compensating the repudiated contract party for what should have been paid. *McMillian v. FDIC*, 81 F.3d 1041, 1055 (11th Cir. 1996).

It has also always been understood, although no case is directly on point, that Congress drew a distinction between "damages" claims under subsection (e) and "creditor" claims under subsection (d), and that Congress intended that § 1821(e) contract repudiation "damages" be a liability of the FDIC, rather

than a claim against the former bank's assets. *See, e.g., Homeland Stores, Inc. v. RTC*, 17 F.3d 1269 (10th Cir. 1994).

On the other hand, no court has ever held that a right to "damages" could be satisfied with anything but cash nor that parties to whom Congress granted a right after seizure to "actual direct compensatory damages" or any other form of post-seizure "damages" from the FDIC instead became creditors of the former bank who must be paid from the liquidated assets of that bank. And, not only has no court ever held that Congress' award of damages to a party was inconsistent with a state's desire that such damages be paid in cash, that conclusion flies in the face of this Court's holding that without an identifiable federal policy or interest it is improper to allow the FDIC to displace a state's law with some presumed "federal common-law" defense to its liability. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994).

There is no reason why Congress would order the FDIC to pay repudiation damages with the unstated intent that the damaged parties could never be made whole, The FDIC's argument has no more substance than what it made in *O'Melveny*. And if the decision below continues as precedent it will have a significant and long-lasting negative impact on banks and those who make contracts with banks, for no discernable congressional purpose.

B. The FDIC's Opposition Ignores Congress' Careful Choice of Language in § 1821(d), § 1821(e) and § 1821(i).

The fundamental flaw in the FDIC's argument is its disregard for Congress' choice of language. It uses terms broadly that Congress used narrowly, omits and adds qualifiers that are not in the statute and disregards the context of the law. What the FDIC does not do is confront the express language of the statute and the impossibility of merging damages claims under subsection (e) into the payment process for ordinary trade creditors set out at length in subsection (d).

Throughout its brief, the FDIC persists in referring to "creditors" and "creditor claims" as if Congress had applied those terms to repudiation damages claimants. Br. Resp. 5-7. It did not. Not once did Congress call a "damages" claimant a "creditor" nor did Congress include the payment of "damages" in the process leading to payment of creditors' claims. To the contrary, the plain language of the statute undermines the FDIC's argument.

For one example, among many others, the claims process that ends in distribution of the former bank's assets begins with a requirement that the FDIC promptly mail notice to creditors shown on the institution's books to file a claim within 90 days or lose the right to be paid. 12 U.S.C. §§ 1821(d)(3)(B) and (C). But damages claimants are not only not creditors, are not shown as such on the failed bank's books and receive no notice, they do not become claimants until some future date if the FDIC chooses to repudiate their contracts, and at that time they become claimants against the FDIC, not the bank.

The FDIC is similarly undone by its reliance on the distribution priority that Congress created in 1993 to establish by statute the order in which the creditors were entitled to a pro rata share of the liquidated assets. § 1821(d)(11)(A). The problem for the FDIC here is that "damages" claimants are not included in the five categories to which Congress restricted the distribution of those liquidated assets of the failed bank: "damages" are not administrative expenses, they are not deposit liabilities, they are not general or senior liabilities of the bank, they are not obligations subordinate to depositors or creditors and they are not obligations to shareholders. *See* § 1821(d)(11)(A)(i)-(v).

It can therefore hardly "upset" the distribution priority among the contenders for the former bank's liquidated assets if the FDIC must pay "damages" claims such as petitioners directly, rather than from those assets. It therefore cannot be said, as the Ninth Circuit did below, that paying petitioners in

cash would allow them to "jump the line", since Congress expressly left them out of that line. Pet. App. 7a. The distribution priority set out in § 1821(d)(11)(A) thus precludes the payment of damages from the liquidated assets of the failed bank and requires their payment by the FDIC as money damages as Congress provided in subsection (e).

The FDIC's reliance on Congress' limitation on the aggregate amount of payments to allowed creditors to the total value of the former bank's liquidated assets in § 1821(i) is similarly misguided. Subsection (i)(2) indeed requires that a claimant's recovery not exceed its pro rata share of the liquidated institution's assets, but subsection (i) by its own language "govern[s] the rights of the *creditors* (other than insured depositors) *of such institution*." Pet. App. 48a (emphasis added). But it is the claims of creditors of the bank alone who are subject to the subsection (i) ceiling, *First Indiana Federal Savings Bank v. FDIC*, 964 F.2d 503, 507 (5th Cir. 1992), petitioners are not creditors of the former bank but have direct claims against the FDIC instead, and thus subsection (i) has no application to petitioners' claims at all.

Indeed, were § 1821(i) to mean what the FDIC and the Ninth Circuit said it meant, as a practical matter *no* entity with *any* claim against the FDIC for *any* act of the FDIC could *ever* be made whole. If the most that the FDIC would ever have to pay to any claimant under any circumstances is an amount equal to the claimant's pro rata share of what was realized by liquidating the few remaining assets of the failed bank, then that same limitation would have to be imposed on, for example, the damages that this Court required FSLIC to pay for its breach of contract in *United States v. Winstar Corp.*, 518 U.S. 839, 871, 909-910 (1996), the "full cash amount" of compensatory damages that the Ninth Circuit said that the FDIC was required to pay to the plaintiffs in *Sharpe v. FDIC*, 126 F.3d 1147, 1156-1157 (9th Cir. 1997), and a $26.6 million judgment against the FDIC for its repudiation of a contract, also upheld by the Ninth

Circuit, would have had to have been reduced to a pro rata share of the bank's liquidated assets, *Far West Federal Bank v. Thrift Supervision-Director*, 119 F.3d 1358, 1367 (9th Cir. 1997).

Clearly, Congress intended § 1821(i) simply to protect the FDIC from having to pay the trade creditors of the failed bank any more than what it had collected from liquidating the defunct bank's assets. Equally clearly, Congress did not intend that subsection (i) should also cap the direct liability of the FDIC for its own acts, including breaches of contract or, as here, the payment of repudiation damages.

Finally, if Congress had intended that repudiation damages suffered by persons like petitioners should be included among the claims of the former bank's pre-seizure creditors it would have said so. After all, Congress demonstrated that it was perfectly capable of expressly importing provisions of subsection (d) into subsection (e) when it chose to do so, as it did when it provided in subsections (e)(7)(A) and (e)(7)(B) that some claims be paid in accordance with subsections (d) and (i), that other claims be included in the distribution priority as administrative expenses under subsection (d)(11)(A) and when Congress specified in subsection (e)(8)(B) that subsection (d)(12) should apply in the case of judicial actions arising out of certain qualified financial contracts.

The scenario that the FDIC and the Ninth Circuit posit is irrational and destructive of Congress' purpose. If Congress intended that petitioners should be made whole it would not have forced them to look to a scheme that by its express language gives them nothing, and clearly Congress did not do so.

While the relevant language is not a masterpiece of clear writing, lack of clarity is not ambiguity and when Congress writes a statute its language should be read to give meaning to the words that Congress chooses. *Johnson v. United States*, __ U.S. __, 120 S. Ct. 1795, 1803-1805, esp. 1804, n.9 (2000); and *see* 120 S. Ct. at 1808-1812 (Scalia, J., dissenting). As Congress did not allow claims for damages owed by the FDIC to be paid from the marshaled assets, the only conclusion to be

drawn is, as petitioners argue, that Congress knew and intended that "damages" be payable in money.

C. The Statute as Written by Congress Upholds California's Interest in Cash Payment of Petitioners' Severance Pay

Finally, the FDIC's argument that California law has been preempted and that in any event it is unclear fails because it is based on the erroneous conclusion that Congress did not intend that petitioners be paid in cash.

First, neither the FDIC nor the Ninth Circuit ever explains why it is "not clear" that California law requires payment in cash.[1] Br. Resp. 12. What is crystal clear, however, is that since § 1821(d)(11) does not give petitioners a right to participate in the liquidated assets of the failed bank and § 1821(e) gives petitioners a right to be paid in cash by the FDIC, petitioners' formulation, as quoted by the FDIC, is entirely correct:

> . . . California law as understood by petitioners would entitle them to "payment in full, while other claimants would be limited to their share of whatever bank assets were left over."

Br. Resp. 12, quoting Pet. App. 16a.

Consequently, Congress' intention that petitioners should be paid in cash by the FDIC and not limited to a belated participation in the scraps of the failed bank, and California's intention that severance and separation pay benefits be paid in cash, are entirely congruent.

The test for preemption is, of course, whether enforcement of the state law impedes the accomplishment and execution of Congress' full purposes and objectives. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941). A conclusion that Congress intended to

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1. If the consistently stated position of the California cases and the language of the California statutes are not sufficiently clear the Court of Appeals could have certified the question to the California Supreme Court.

occupy that field would be directly at odds with Congress' choice of the word "damages", its creation of two discrete paths, for the bank's creditors against the bank's assets and "damages" claimants directly against the FDIC, and Congress' careful use of the word "creditor" only with respect to claimants under subsection (d). California's interest and that expressed by Congress are the same and the Ninth Circuit's interpretation thwarts, rather than advances, Congress' purpose in allowing the FDIC to repudiate contracts but protect the contracting parties from serious consequences. *O'Melveny & Myers v. FDIC*, *supra*, 512 U.S. at 86-89.

CONCLUSION

The FDIC's position and that of the Ninth Circuit are simply incorrect and if allowed to stand it not only deprives petitioners of over $750,000 in benefits that California law entitles them to be paid in cash, it will materially and negatively impact the way third parties do business with the nation's banks. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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